

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CARLOS VEGA,

Defendant-Appellee.

UNPUBLISHED

September 18, 2003

No. 240466

Eaton Circuit Court

LC No. 01-020343-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS VEGA,

Defendant-Appellant.

No. 241142

Eaton Circuit Court

LC No. 01-020343-FH

Before: Sawyer, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

In Docket No. 240466, the prosecutor appeals the sentence imposed on defendant following his conviction by a jury on charges of second-degree criminal sexual conduct (CSC II), MCL 750.520c, assault with intent to commit sexual penetration, MCL 750.520g, and first-degree home invasion, MCL 750.110a(2). In Docket No. 241142, defendant appeals as of right his conviction on the assault and CSC II charges, asserting conviction on both these charges constitutes double jeopardy. We affirm the conviction but reverse and remand for resentencing in Docket No. 240466 and affirm in Docket No. 241142.

First, the prosecutor asserts the trial court erred in departing downward from the legislative sentencing guidelines. We agree. In reviewing a departure from the legislative sentencing guidelines' range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion. *People v Babcock*, ___ Mich ___, 666 NW2d 231 (Docket No. 121310, decided July 31, 2003), slip op at 18. See also

People v Lowery, ___ Mich App ___; ___ NW2d ___ (Dkt. No. 240001, rel'd 8/21/03), slip op at 1-2.

Because defendant committed these offenses in April 2001, the legislative sentencing guidelines applied. MCL 769.34(2). A trial court may depart from the statutory guidelines only if it finds a substantial and compelling reason for the particular departure and states that reason on the record. MCL 769.34(3); see also *Babcock*, *supra*, slip op at 8-11; *Lowery*, *supra*, slip op at 2. As our Supreme Court recently explained in *Babcock*, quoting in part from *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995):

[A] ‘substantial and compelling reason’ must be construed to mean an ‘objective and verifiable’ reason that ‘keenly or irresistibly grabs our attention’; is ‘of considerable worth in deciding the length of a sentence’; and ‘exists only in exceptional cases.’ [*Id.*, slip op at 9.]

The trial court’s reason or reasons for a departure, as indicated by the *Babcock* Court, must be based on objective and verifiable factors.¹ *Id.*, slip op at 8-10. Objective and verifiable factors are those that are external to the minds of the judge, defendant, and others involved in making the decision and are capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991).

The *Babcock* Court also held that, in reviewing a trial court’s determination that substantial and compelling reason(s) exist warranting a departure, we are to apply an abuse of discretion standard. *Id.*, slip op at 18. The Court, recognizing as did the Legislature that trial court’s are optimally situated to determine an appropriate sentence, held that “[a]n abuse of discretion occurs. . .when the trial court chooses an outcome falling outside . . . [a] principled range of outcomes.” *Id.* at 23. This formulation recognizes that “[a]t its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.” *Id.* Therefore, if the trial court chooses one of the reasonable and principled outcomes, no abuse of discretion has occurred. If, however, the trial court’s choice falls outside of what is considered a reasonable and principled outcome, an abuse of discretion has occurred. *Id.*²

The trial court cited four reasons for departing below the guidelines: (1) defendant’s prior relationship with the victim, (2) ambivalence about its earlier ruling on defendant’s double

¹ Defendant asserts a trial court’s reasons for departure need not be objective and verifiable and argues the case the prosecutor relies on for this proposition, *Fields*, *supra*, is inapposite because it concerns mandatory minimum sentences rather than the legislative sentencing guidelines. However, the objective and verifiable requirement also applies to guideline departures. *Babcock*, *supra*, slip op at 8-10.

² As the Court noted, this standard of review falls in between de novo review and the very deferential abuse of discretion standard articulated in *Spalding v Spalding*, 355 Mich 382, 384-384; 94 NW2d 810 (1959). *Id.* In conducting this review, however, we must keep in mind “the trial court’s extensive knowledge of the facts and that court’s direct familiarity with the circumstances of the offender.” *Id.* at 24.

jeopardy motion, (3) an impression that defendant was a good person and was unlikely to commit further crimes, and (4) a view that the guidelines are discretionary rather than mandatory. Applying the standard of review set forth in *Babcock*, we conclude that none of these factors provide substantial and compelling reasons to depart from the guidelines.

First, a prior relationship between a victim and a defendant is a proper factor to rely on to depart from the sentencing guidelines and may constitute either a mitigating or aggravating circumstance, depending on the parties' history. *People v Milbourn*, 435 Mich 630, 660-661; 461 NW2d 1 (1990); *People v Moorner*, 246 Mich App 680, 684-685; 635 NW2d 47 (2001). The trial court deemed the prior relationship a mitigating circumstance because it viewed an attack by a stranger to be worse than an attack by someone known to the victim. Although we must give deference to the trial court's familiarity with the case and the defendant, we conclude that the court failed to consider other, aggravating aspects of the relationship, including defendant's persistence in pursuing a relationship with the victim despite her attempts to withdraw. Indeed, the trial court failed to indicate what it was about *this* relationship that warranted a departure, instead relying on its generalization that familiarity between the victim and defendant warrants a departure. Thus, although this was a proper consideration, the fact of a relationship alone did not provide a substantial and compelling reason to depart below the guidelines in this particular case without further explanation.

Second, the trial court's ambivalence about its ruling on defendant's double jeopardy claim did not support its departure from the guidelines because its doubts about the ruling were neither objective nor verifiable. *Hill, supra* at 112. Moreover, even if the uncertainty could be considered a proper factor, defendant's sentence would not have changed if the trial court had granted his motion to quash the indictment.

Third, the trial court's impressions of defendant's character and his chances for recidivism do not constitute objective and verifiable facts on which to base a departure and, therefore, are not substantial and compelling reasons to depart. See *People v Daniel*, 462 Mich 1, 6; 609 NW2d 557 (2000). Finally, because the trial court did not articulate substantial and compelling reasons to depart from the guidelines, it was bound to follow them. MCL 769.34(3).³ They do not serve to provide mere guidance. *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). Additionally, the sentence defendant would have received under earlier, discretionary guidelines was irrelevant to his sentencing under the current guidelines. Thus, to the extent the trial court relied on previous guidelines to justify its sentence, it erred.

Because the trial court did not articulate substantial and compelling reasons for departing from the legislative sentencing guidelines, we remand for resentencing or rearticulation of a substantial and compelling reason, based on objective and verifiable factors, to justify any particular departure. MCL 769.34(11); *Babcock, supra*, slip op at 13.

³ Whether these guidelines, as opposed to any prior ones, are "correct" or not, is of no concern to the judiciary in deciding cases. We are bound to follow these legislative enactments until they are modified or repealed by the Legislature. *People v Hegwood*, 465 Mich 432, 439-440; 636 NW2d 127 (2001).

Turning to defendant's appeal, defendant claims his convictions on charges of CSC II and assault with intent to commit sexual penetration violate his double jeopardy protections. We disagree. A double jeopardy claim presents a question of law that is reviewed de novo on appeal. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

The United States and the Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. In other words, the double jeopardy clause "protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." *People v Squires*, 240 Mich App 456, 454; 613 NW2d 361 (2000).

The Legislature's intent is the determining factor in evaluating a double jeopardy claim under both the federal and state constitutions. *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984); *People v Dillard*, 246 Mich App 163, 165; 631 NW2d 755 (2001). In determining whether the Legislature intended to provide cumulative punishments for similar crimes, we consider whether one statute prohibits conduct violative of a social norm distinct from the norm protected by the other statute; the amount of punishment authorized by each statute; and whether the statutes are hierarchical or cumulative, among other factors. *Robideau*, *supra* at 487-488; *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992).

Statutes are hierarchical where "one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute." *Robideau*, *supra* at 487-488. The elements of assault with intent to commit a sexual penetration are (1) an assault; (2) with an improper sexual purpose or intent; (3) an intent to commit an act involving penetration; and (4) an aggravating circumstance, such as the use of force or coercion. MCL 750.520g(1); *People v Snell*, 118 Mich App 750, 754-755; 325 NW2d 563 (1982). Conversely, CSC II requires sexual contact with another person under various circumstances, including circumstances involving the commission of another felony or while the actor is armed with a weapon or an article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon. MCL 750.520c(1). Unlike assault with intent to commit sexual penetration, which requires specific intent, MCL 750.520g(1), CSC is a general intent crime; the defendant's specific intent is not an issue. *People v Piper*, 223 Mich App 642, 646; 567 NW2d 483 (1997). The statutes at issue are not hierarchical because neither statute incorporates most of the elements of the other. *People v Alexander*, 82 Mich App 621, 624-626; 267 NW2d 466 (1978).

Next, "[w]here two statutes prohibit violations of the same social norm, albeit in a somewhat different manner, as a general principle it can be concluded that the Legislature did not intend multiple punishments." *Robideau*, *supra* at 487. CSC II prohibits sexual contact, while the assault offense addresses threatened sexual penetration. Therefore, the two offenses do not prohibit violation of the same social norm. See *People v Ward*, 206 Mich App 38, 42; 520 NW2d 363 (1994).

Turning to the levels of punishment the statutes provide, CSC II carries a greater punishment than the assault offense. However, because the offenses are not hierarchical and do not prohibit violation of the same social norm, the difference in punishment merely reflects a greater level of punishment for the graver of the two separate offenses.

Finally, “[t]here is no violation of double jeopardy protections if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other.” *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995). When defendant touched the victim’s breast, the assault ended and the criminal sexual conduct began. Therefore, the actions were separate offenses, and defendant’s convictions for both do not constitute double jeopardy.

We affirm defendant’s conviction, but reverse and remand for resentencing or rearticulation of a substantial and compelling reason to justify the departure. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray